showed that, as of mid-1995, Tier 1 LECs still controlled "97% of access revenues -- a level roughly comparable to the Bell System's share of toll revenues in 1981."[33/] The LECs thus still possess an enormous competitive advantage in their monopoly control over their essential local loop facilities.

Because LECs continue to exert market power control over essential local loop facilities, and have demonstrated intense antipathy for any reform that potentially might harm their gilded revenue base and might lead to more competition, pro-competitive Commission action is vital. Just as the Commission's pro-competitive interconnection and resale policies in the long distance context resulted in the dismantling of AT&T's monopoly in long distance services and the evolution of thriving, facilities-based competition, decisive and expeditious FCC correction of anticompetitive abuses in LEC-CMRS interconnection can promote wireless competition virtually the day it is implemented.[34/]

The incumbent LEC claims that cellular subscriber rates are disproportionately high also mischaracterize the present state of intra-mobile competition. Current cellular markets are not yet fully competitive, nor even close to approximating a substitute for landline LEC

33/ See Common Carrier Competition; Spring 1995, at 5 (Industry Analysis Div.) Rep. No. 95-31 released May 31, 1995; ("1995 Competition Report").

34/ See Cox Enterprises, Inc., Back to the Future: The FCC and Local Exchange Competition Into the Next Century, filed as an ex parte in CC Docket No. 95-185, on January 31, 1996.

service.[35/] That has simply not been their market. It is widely agreed that cellular rates will decline as cellular converts to digital and PCS and other mobile alternatives are deployed.[36/] LEC comments fail to take into account the upcoming competitive dynamic between PCS and cellular. The incumbent LECs' emphasis on current cellular rates thus does not support their conclusion that CMRS rates will never decline sufficiently to allow CMRS to become a competitive replacement for landline local exchange service, or that incumbent LEC interconnection costs are insignificant costs to non-LEC affiliated CMRS providers.

In this regard, Bell Atlantic draws a false analogy and ignores settled economic theory in highlighting the disparity between cellular average retail rates and Bell Atlantic's interconnection rate.[37/] Bell Atlantic concludes that, even if its interconnection rate were reduced to zero, current CMRS retail rates in its region would only be lowered by 3 percent. Bell Atlantic misses the point. Simply because zero-based LEC interconnection rates would

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35/ Bell Atlantic's reliance on a Commission finding that cellular penetration is expected to reach 20 percent by the year 2000 tells only half of the story. See Bell Atlantic Comments at 10 (citing Annual Assessment of CMRS Competition). By comparison, landline telephone penetration hovered at 94 percent on a nationwide basis, as of July, 1995. See Alexander Belinfante, Telephone Subscribership in the United States (Industry Analysis Div., December 1995), (released January 23, 1996); see also Notice at ¶ 9 n.6 (citing Monitoring Report, CC Docket No. 87-339, Table 1.1 (Industry Analysis Div., May 1995) ("LEC networks [] reach, on a nationwide basis, 93.8% of all households . . . .")).

36/ See Testimony of Anne K. Bingaman and Regina Keeney, Before the Committee on Commerce, Competition in the Cellular Telephone Service Industry, 104th Cong., 1st Sess., October 12, 1995.

37/ Bell Atlantic Comments at 11 and Attachment 1 (stating cellular per minute retail rates are 48 cents as compared to Bell Atlantic's CMRS interconnection rate of approximately 2.2 cents).

supposedly result in only a small up-front reduction in CMRS retail rates, it does not follow that current LEC interconnection rates are just, reasonable and nondiscriminatory -- particularly since the LECs have freely admitted that their rates are far in excess of their incremental costs.[38/] As a noted LEC economist readily admits, the cost of this intermediate market input does matter greatly from the standpoint of economic efficiency.[39/] The answer is not to aid and abet the LEC agenda of delaying CMRS interconnection reform. The answer is to immediately order the exchange of traffic on an interim bill and keep basis using a zero-based rate.

c. LEC Hysteria Regarding Their Cost Recovery Should be Ignored.

One of the primary arguments advanced by the LECs is that bill and keep violates basic economic principles of cost recovery because LECs are not compensated for use of their facilities.[40/] This supposed lack of cost recovery is characterized as potentially jeopardizing the Commission's universal service goals and, according to some LECs, rises to

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38/ Bell Atlantic, for example, asserts that it charges CMRS providers its interstate access charge rate -- a rate that is plainly not incremental cost. Bell Atlantic Comments Attachment 1.

39/ SBC Comments Attachment A, Testimony of Jerry A. Hausman on Behalf of Cellular One, Commonwealth of Massachusetts Department of Public Utilities, D.P.U. 94-185, May 1995 at 5-6.

40/ USTA Comments at 21-24; PacBell Comments at 34-45.

the level of an unconstitutional taking.[41] As demonstrated below, these arguments are long on hype and short on substance. Like the storybook Wizard of Oz, one look behind the curtain reveals there is no cause for concern.

(1) Bill and Keep Is Entirely Consistent with the Pricing Principles of the TCA.

A number of LECs make the incredible argument that bill and keep cannot be adopted by the Commission even as an interim measure because it is inconsistent with the pricing principles established by the TCA. The TCA requires the terms and conditions for termination and transport of traffic to be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[42] Bill and keep is specifically featured as an appropriate option for traffic termination between co-carriers because it reasonably approximates the additional cost of terminating CMRS traffic over incumbent LEC networks.[43]

As an initial matter, no LEC has demonstrated that it has incurred or will incur significant (or for that matter any) additional costs as a direct result of the obligation to terminate CMRS traffic. Rather, the LECs have asserted only that an interim bill and keep

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41/ Bell Atlantic Comments at 8-9; BellSouth Comments at 18-20; PacBell Comments at 79-88; U S West Comments at 49-53.

42/ 47 U.S.C. § 252(d)(2)(A)(ii).

43/ See e.g., TCA § 252(d)(2)(A) (stating that the terms and conditions for reciprocal compensation will be considered just and reasonable if "such terms and conditions determine [the costs of transport and termination] on the basis of a reasonable approximation of the additional costs of terminating [] calls").

mutual compensation arrangement will deprive them of some highly inflated, non-cost based revenues that they are accustomed to collecting.[44/] Given the extremely low incremental cost of terminating traffic and the fact that LEC networks already are engineered to handle the peak periods generated by calls to and from their customers,[45/] the LEC comments prove only that they have been collecting monopoly rents from cellular providers, but not that they incur additional costs due to CMRS interconnection. Further, the LECs uniformly fail to explain how they can justify continuing to collect these monopoly rents when the TCA pricing standard contained in Section 252(d)(2)(A)(ii) requires incremental cost as the basis for exchange and transport of traffic between carriers for termination.[46/]

The LEC arguments also are based on the bankrupt economic theory that LECs are entitled to recover from all carriers not only incremental costs, but also common costs, overhead and "legacy" costs. These are non-forward-looking costs incurred by the LEC in the past and allegedly remain unrecovered due to deferred depreciation practices imposed by

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44/ USTA estimates that the loss of CMRS interconnection revenues will result in an annual LEC revenue shortfall of $1.1 billion, substantially more than its $440 million estimate of the "costs" of CMRS interconnection. USTA Comments, SPR Report at 11.

45/ Teleport Comments at 16 ("unless the existence of CMRS providers substantially changes those calling patterns to create a new and higher peak calling period -- an unlikely circumstance due to the 'drive time' characteristics of CMRS traffic -- the ILEC will not incur any additional costs in serving those customers"); AirTouch Comments at 23.

46/ As explained by Dr. Brock, "[t]here is a clear distinction between carriers entitled to symmetrical payments for traffic interchanged for mutual benefit and customers who pay for service rendered. At maximum, interconnection payments are determined by the incremental cost of providing the interconnection service." Brock Reply at 15.

regulators.[47/] Cox demonstrated previously that this position is fatally flawed and that the only relevant costs for purposes of determining interconnection rates are forward looking long run incremental costs. As explained by Dr. Brock, forward looking costs are the appropriate costs because they are the true incremental costs of adding capacity.[48/] Regardless of what was paid for current plant or how it is being depreciated, the cost of adding capacity for providing terminating service is the cost of adding new plant. Given the total lack of evidence regarding cost causation and the substantial data in the record that bill and keep is a sufficiently close approximation of actual cost, bill and keep does not violate basic principles of reciprocal cost recovery.

It is important to recognize that proponents of an interim bill and keep approach, such as Cox, are not arguing that there is no cost to a network when it transports and terminates traffic. Rather, the record reveals that the additional cost of performing this function is, on average, a tiny 0.20 cents per minute. When this miniscule amount is then offset by (1) the significant costs of measuring and charging for traffic, (2) the substantial regulatory costs of litigating cost issues, and (3) the potentially higher costs of terminating and transporting calls incurred by the CMRS network, the result is a number so small (if it isn't a negative number) that regulators should ignore it. Indeed, that is exactly what the parties to an interconnection negotiation with equal bargaining power would do.

47/ U S West Comments at 39.

48/ Brock Reply at 5.

Several LECs characterize the FCC's proposed bill and keep compensation as allowing CMRS providers to benefit from the investments LECs have made in their networks, thereby providing interconnectors a "free ride" on their system.[49] This half-baked argument overlooks the investments incurred by CMRS providers for the termination of LEC traffic on their networks and fails to recognize the co-carrier nature of the LEC-CMRS relationship.[50]

As has been demonstrated, the incremental costs of terminating traffic on the LEC networks are de minimis. In similar circumstances, the FCC has determined that providing for no cost recovery between carriers is not improper, and may even lead to pro-competitive public benefits.[51] Moreover, the FCC explicitly has recognized that it is not required to permit telecommunications companies to charge separately for transmission when the costs of transmission are zero or de minimis.[52] It must be emphasized that under a CMRS-LEC reciprocal compensation arrangement, LECs get the benefit of free termination of traffic on

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49/ See SBC Comments at 9-11 (arguing that bill and keep promotes "free riding" in which one carrier avoids making new investments and simply takes advantage of costs incurred by others); see also PacBell Comments at 35; U S West Comments at 40; GTE Comments at 22; BellSouth Comments at 27.

50/ It also ignores the fact that LEC telephone ratepayers and not shareholders have, to a large extent, provided the financial base upon which LEC buildout and upgrades have been made possible. These same LEC ratepayers will benefit tremendously from the introduction of a real choice in telecommunications service providers.

51/ See People of the State of CA, 75 F.3d 1350, 1362 (1996) (recognizing that a free passage rule will permit IXCs to develop and market their own CPNI based number services).

52/ See id., 75 F.3d at 1363.

CMRS networks. The FCC thus should view any de minimis costs as an unavoidable by-product of being part of a fully-integrated network of networks.[53/]

(2) Bill and Keep Will Not Jeopardize Universal Service.

Bill and keep has nothing whatsoever to do with universal service. The argument that the LEC revenue shortfall attributable to bill and keep will jeopardize universal service should be rejected out of hand. The incumbents' argument assumes that competition is a "make whole" game for the LECs and that any "lost" revenues must be recovered from captive telephone ratepayers.[54/] As a matter of public policy this assumption is wrong. In a competitive market, no carrier is "entitled" to a particular rate of return. LECs have been operating under incentive regulation at the federal level and in many states for years. Part of the "bargain" LECs struck in pushing for the adoption of price cap regulation was the assumption of some risk that they would no longer enjoy guaranteed earnings on a regulated rate base. To claim now that there is some continuing entitlement to monopoly earnings as a monopoly legacy is entirely antithetical to the establishment of competition. Both federal and state regulators will be grappling with this issue of incumbent LEC embedded costs when the TCA is implemented. There is no reason in the meantime for the FCC to hesitate in

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53/ See generally id., 75 F.3d at 1363 (determining that investment in SS7 systems constitutes a general network upgrade, the core costs of which are borne by all network users).

54/ U S West Comments at 26 ("U S West would lose this sizable Type 2 revenue stream if the Commission were to adopt bill and keep. . . . U S West [must] be made whole"); see also NYNEX Comments at 15-19.

ordering an interim approach for CMRS interconnection that advances the potential for competition, particularly given the suspect nature of the asserted LEC "losses" stemming from an interim bill and keep requirement.

In addition, the incumbent LEC assertion that a loss of interconnection revenue from CMRS must be replaced by increased intrastate rates is at best unproven. It seems fairly obvious and obviously fair that if the interconnection is interstate the costs for the interconnection termination should be recovered in toto from the interstate jurisdiction. Contrary to NYNEX's suggestion, the FCC could make this determination expeditiously as part of this proceeding and there would be no need for intrastate cost or rate increases.[55/] It is not clear in any event how the incumbent LECs have chosen to treat CMRS interconnection revenue because it has never been part of the formal jurisdictional separations process.[56/] Certainly the FCC can decide to specify the treatment of these costs and revenues going forward and should endeavor to match the costs and revenues to the same jurisdiction. The incumbent LECs should not prevail on the faulty premise that interstate costs should be recovered from intrastate services.[57/] Even if a LEC could demonstrate that it incurred additional costs as a result of the obligation to terminate CMRS traffic, those costs should be

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55/ See NYNEX Comments at 33-34.

56/ See The Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987) ("We are not mandating a jurisdictional separations process for the cellular service.").

57/ As explained in detail in subsection (B)(2), the 1993 Budget Act federalized CMRS regulation.

assigned directly and recovered from interstate services, rather than from basic local exchange services or other categories that are part of the current jurisdictional separations process.

Furthermore, the LEC arguments ignore the fact that LEC customers plainly benefit from the ability to make calls to and receive calls from CMRS providers. Just as it is appropriate that the rates LEC customers pay reflect the benefit LEC customers receive from being able to make calls to neighboring areas served by a different landline carrier, it is equally appropriate that end user rates reflect the benefit LEC customers receive from the ability to make calls to CMRS customers.[58/] The same public policy reasons that support a bill and keep arrangement in the case of neighboring carriers support a similar interim arrangement between LECs and CMRS providers.[59/]

It is not disputed that adoption of an interim bill and keep will result in a disparity between CMRS interconnection rates and high interstate access charges. The LECs have expressed great concern that if CMRS providers interconnect on a bill and keep basis and

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58/ This is not to suggest, however, that a LEC-imposed calling party pays arrangement would not be obviously anticompetitive. PacBell, for example, suggests that its intrastate revenue "shortfall" should be remedied by assessing per minute usage rates on any of its customers calling a CMRS providers' customers. PacBell Comments at 18. Leaving aside the flawed premise that there would be any intrastate revenue shortfall, such an assessment would be nothing more than a strategic pricing plan to discourage the growth of CMRS as a competitor.

59/ While several LECs assert that the exchange of traffic on a zero-based co-carrier arrangement is suitable for landline networks but not for CMRS, they have failed to identify any particular reason for their distinction.

interexchange carriers are required to pay interstate access charges, interexchange carriers might attempt to "launder" their terminating traffic through a CMRS provider.[60/] As shown by Dr. Brock, the arbitrage problem "is neither new nor unique to CMRS interconnection. Potential arbitrage between high interstate access rates and low rates for equivalent service not classified as interstate access have been dealt with by the Commission many times in the two decades since the issue was first raised by MCI's Execunet service."[61/]

While the LECs attempt to create the impression that CMRS providers would be the only class of "customers" not paying highly inflated access charges, this obviously is an exaggeration. There are presently a wide variety of rates for interconnection: interstate access, intrastate access, LEC-to-LEC interconnection, CAP-to-LEC interconnection, and CMRS-to-LEC interconnection. The different rates create opportunities for arbitrage. The Commission has reduced the opportunities for arbitrage with measures such as the "Percentage of Interstate Use" factor used to distinguish traffic charged at interstate access rates from traffic charged at intrastate access rates and there is no reason to believe the

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60/ Under this scenario, interexchange traffic designated for a LEC destination could be routed first through a CMRS provider and then to the LEC. Because the traffic coming from the CMRS provider to the LEC for termination is not routinely identified, any interstate interexchange traffic would appear to the LEC as originated by the CMRS carrier and would thereby benefit from bill and keep arrangements.

61/ Brock Reply at 13-14.

Commission could not take similar steps to limit the potential for arbitrage on an interim basis if it truly believed there was any real cause for concern.[62]

The long term solution is to move toward a more unified approach, which can be done as part of the TCA implementation and access charge reform. It is not possible, however, to eliminate arbitrage opportunities simply by setting a CMRS rate at a particular level. If the rate is set at the level of interstate access charges, as LECs would prefer, opportunities for arbitrage with interstate access are eliminated, but new opportunities are created for arbitrage with any other interconnection charged at a different rate.

A short-term, expedient solution to the potential for arbitrage between CMRS and interexchange access rates is to impose access rates on any traffic delivered to a LEC for termination if it has been received by the CMRS provider from an interexchange carrier outside the CMRS providers's service area.[63] CMRS carriers could be required to report this traffic to the LEC and pay access charges. There is plainly no need and likely little chance of success that some other type of measurement or traffic surrogate could be

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62/ No LEC presents evidence that arbitrage is a problem today, although in at least one LEC market IXCs pay rates double those charged to CMRS providers under present interconnection arrangements. See U S West Comments at 8. Nor do the LECs present the slightest bit of evidence to suggest that a change in this disparity between IXC and CMRS rates for access to LEC customers during an interim period would cause a dramatic shift in traffic by IXCs.

63/ In this way, traffic that is only transiting the CMRS network (neither originated nor terminated by the CMRS carrier) would not be entitled to bill and keep treatment if it would have been subject to interstate access charges without the CMRS intermediary.

developed quickly. Under these circumstances, CMRS provider certification would be the most practical and easily administered alternative.

Finally, the concerns raised by the LECs regarding the long term sustainability of access charges that include implicit support for universal service are legitimate, but they have been an issue for some time and need not and should not be addressed in this proceeding where the Commission quite properly has tentatively concluded an interim reciprocal compensation arrangement should proceed prior to long-term access reform. Congress has made clear in the TCA that the pricing standard for the mutual transport and termination of traffic pursuant to a reciprocal compensation arrangement is separate and distinct from the pricing standard that would potentially apply to services purchased by an interexchange carrier.

Under Section 252(d)(1) of the TCA, an interexchange carrier that purchases interconnection and unbundled network elements from an incumbent LEC must pay a rate that is based on cost and may include a reasonable profit.[64/] In contrast, under Section 252(d)(2), the pricing standard for termination of traffic under a reciprocal compensation arrangement between carriers is a reasonable approximation of the additional costs incurred by the terminating carrier. As explained by Dr. Brock, this language contemplates termination charges that are based on forward looking incremental costs.[65/]

64/ 47 U.S.C. § 252(d)(1).

65/ Brock Reply at 5.

These provisions are not cumulative, as PacBell seems to assert,[66] but instead are intended to cover entirely different functions provided by incumbent LECs to different types of carriers. The reciprocal compensation arrangements required by Section 251(b)(5) are used to exchange traffic among overlapping, peer networks in an economically efficient manner so that each network's subscribers can communicate with the other network's subscribers. By contrast, the duties of incumbent LECs to interconnect and provide access to unbundled network elements are triggered when a telecommunications carrier such as an interexchange carrier that does not have its own local facilities seeks to use the incumbent LEC's network to transport traffic. The marketplace analogy is the difference between barter for mutual exchange of traffic and rents paid for LEC facilities by a non-facilities-based provider. Thus, disparate pricing standards for interexchange access, network elements and transport and termination are entirely consistent with congressional intent.

Moreover, the Commission recently initiated a proceeding to establish universal service support mechanisms as required by the TCA.[67] In that proceeding, the Commission has acknowledged the link between universal service and access charge reform and the TCA

66/ "Our negotiated pricing is to be based on 'the cost . . . of providing interconnection' and 'may include a reasonable profit,' and 'a reasonable approximation of the additional costs of terminating' calls that originate on the network facilities of the other carrier." PacBell Comments at 57.

67/ Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93 (released March 8, 1996).

mandate to remove implicit support from access charges.[68] Incumbent LECs use of this issue to delay resolution of this CMRS interconnection rulemaking is entirely self-serving and anticompetitive.

It is clear from the timing of FCC mandated proceedings in the TCA that Congress intends for interconnection issues to be settled before access and universal service issues are settled. The fact that LEC cost recovery for universal service obligations is being addressed in a later proceeding -- as prescribed by Congress has nothing whatsoever to do with the need for a timely interim bill and keep mutual compensation arrangement for LEC-CMRS interconnection. The American consumer's access to affordable wireless telecommunications services is hanging in the balance. If the FCC waits to implement an omnibus proceeding to determine the economic arrangements for the transport and termination of all telecommunications network traffic, wireless consumers will be set back several years.

(3) Bill and Keep Is Not an Unconstitutional Taking.

The LEC arguments that bill and keep constitutes an unconstitutional taking are similarly misguided.[69] BellSouth, for example, cites the D.C. Circuit's decision regarding physical collocation, Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), as support for the proposition that mandated bill and keep is unconstitutional.[70] Physical collocation,

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68/ Id. at ¶¶ 112-15.

69/ See, e.g., BellSouth Comments at 20; Bell Atlantic Comments at 8; PacBell Comments at 84-86.

70/ BellSouth Comments at 20.

however, involved a government mandated physical invasion of LEC property, which always must be compensated. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Dolan v. City of Tigard, 114 S.Ct. 2309 (1994). Conversely, bill and keep requires the LEC to exchange traffic on the same basis as it does with other LECs and consistent with the pricing standards contained in the TCA.

BellSouth's assertion that "the LEC is denied the use of this property to serve others for the duration of CMRS-originated calls" implies, without any support, that other calls are not completed because the LEC is using its facilities to terminate CMRS traffic. There is absolutely no basis in the record for this implication. Given the evidence that LEC and CMRS peak periods do not coincide, there is no reason to believe that CMRS traffic currently adds any costs or will add any going-forward costs to the incumbent LEC network. Moreover, the termination of traffic is not a physical occupation of property, as in Loretto and Dolan, in any event. Because there is no physical invasion here, the analogy to Bell Atlantic fails.

It is equally plain that bill and keep does not rise to the level of a regulatory taking as argued by a number of LECs.[71/] Penn Central Transportation Co. v. United States, 438 U.S. 104 (1978), establishes three factors that should be considered in deciding whether there has been a regulatory taking: (1) economic impact of the regulation; (2) interference with investment-backed expectations; and (3) character of governmental action. A party claiming

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71/ See, e.g., PacBell Comments at 84.

that a regulation rises to the level of a regulatory taking bears a heavy burden. As the Supreme Court has stated:

> Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another. . . . Our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.[72/]

The argument that a LEC will be subject to substantial economic harm as a result of an interim bill and keep regime misapplies the case law, which generally requires that property be rendered worthless, or virtually worthless, for a taking to exist.[73/] Obviously this is not the case here because the LEC can continue providing all the services it now provides and its termination of traffic for a CMRS provider will have no effect on other uses of its facilities.

As to the second element, interference with investment-backed expectations, courts are clear that the mere loss of anticipated profits does not constitute a taking. As the Supreme Court stated:

> [L]oss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim. . . . the interest

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72/ Connolly v. PBGC, 475 U.S. 211, 223 (1986).

73/ See Connolly, 475 U.S. at 223; Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992); see also Penn Central, 438 U.S. at 136.

in anticipated gains has traditionally been viewed as less compelling than other property-related interests.[74]

The argument that bill and keep interferes with a LEC's expectations under state law carries little weight in the face of these cases. As Cox has demonstrated, the incremental cost to a LEC of a bill and keep arrangement for traffic termination is extremely low, and is probably less than the cost of (1) adding the capability to monitor traffic, (2) charging for traffic, (3) litigating actual costs in regulatory proceedings, and (4) offsetting the result with the CMRS network costs. Moreover, as the balance of traffic equalizes -- clearly a promise in newly deployed digital PCS networks -- the benefit to the LEC of being able to terminate calls on CMRS networks will keep pace with the increased cost, if any, of terminating calls that originate on competing networks. Consequently, as a number of state commissions have found, the imposition of bill and keep will not result in an unconstitutional taking.[75]

74/ Andrus v. Allard, 444 U.S. 51, 66 (1979); see also Lucas, 112 S.Ct. at 2899 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers").

75/ See, e.g., Washington Utilities and Transportation Commission v. U S West Communications, Inc., Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part, Docket UT-941464 (released October 31, 1995) at 35 ("Bill and keep is not a system of interconnection [for free]. Bill and keep is compensatory. There is a reciprocal exchange of traffic in which each company receives something of value.").

(4) Bill and Keep Will Not Result In a Confiscatory Rate.

PacBell makes the argument that imposing bill and keep will result in a confiscatory rate because the LEC will be unable to recover its costs.[76/] As with the takings arguments, the proposition that bill and keep is confiscatory misstates and misapplies traditional notions of constitutionality in the context of ratemaking.

In assessing the constitutionality of a rate decision, the method of regulation is not important, only the end result.[77/] The principles that apply in deciding whether a rate is constitutional are the same in all cases. Courts usually state that there is a "zone of reasonableness" which is "bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates."[78/] In considering investor interests, a court will look at whether the established rate is sufficient to allow the company to "operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . ." Hope, 320 U.S. at 605. Thus, even if the rate for a particular service provided by a regulated carrier is not compensatory, there is a constitutional violation only if that rate jeopardizes the financial integrity of the company as a whole.

76/ PacBell Comments at 80.

77/ FPC v. Hope Natural Gas, 320 U.S. 591 (1944).

78/ Washington Gas Light v. Baker, 188 F.2d 11, 15 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951).

That plainly is not the case here. It has not, and indeed could not, be suggested that imposing bill and keep on an interim basis for CMRS interconnection threatens the financial integrity of any LEC.[79] Indeed, as demonstrated above, the LECs have not even made the case that there are additional costs attributable to the obligation to terminate CMRS traffic or that they fail to receive a concomitant benefit from their ability to terminate traffic on CMRS networks. Accordingly, the argument that bill and keep cannot be implemented because it would produce a confiscatory rate must be rejected by the Commission as flatly contrary to the facts.

d. Other Arguments Against Bill and Keep Are Not Supported by the Record or by Sound Public Policy.

The other arguments advanced by the LECs against bill and keep are equally unpersuasive. A number of LECs argue that bill and keep is inappropriate for LEC-CMRS interconnection because of the historical traffic imbalance between LECs and cellular providers. These arguments ignore the evidence that traffic balance for digital services, such as PCS, will be roughly equal even when the CMRS provider has far fewer customers than the incumbent LEC. As demonstrated by APC, 42 percent of calls between it and Bell Atlantic terminate on the APC network and 58 percent terminate on the Bell Atlantic

79/ USTA states that collectively, the LECs collect approximately $1.1 billion annually from CMRS interconnection. Furthermore, USTA states that these revenues recover "costs" of $440 million. Consequently, even if the Commission were to accept USTA's "incremental" cost estimate of 1.3 cents per minute (which it should not because USTA has added back overheads to derive its figure) and order interim bill and keep, the amount of unrecovered cost for any LEC is not remotely enough to jeopardize their financial integrity.

network.[80/] This ratio is much closer to balance than the typical LEC/cellular arrangement, and would be more balanced but for the one-sided compensation arrangement now in place. As stated by APC, "even traffic flows are a consequence of, not a precondition to, the adoption of bill and keep."[81/]

Moreover, increased competition in the CMRS market, combined with a bill and keep compensation arrangement, will place substantial downward pressure on airtime rates. This pressure in turn will have the effect of increasing the flow of traffic from LEC networks to CMRS networks. This is a result the LECs fear, because it jeopardizes their stranglehold on the local exchange market, but it is precisely the result the Commission should encourage in the name of competition.

The LECs also argue that the use of bill and keep for LEC/LEC interconnection and, more recently, for LEC/CLEC interconnection, does not support its use for LEC/CMRS interconnection.[82/] However, these arrangements provide ample precedent for the proposition that regulators have viewed bill and keep as a reasonable reciprocal compensation method that advances public policy goals. Moreover, Cox is not aware of any reason why what is regarded as good public policy for wireline competition should not be applied to wireless competition. In arguing that LEC/LEC arrangements are not precedential in this context because they involve noncompeting carriers, the LECs implicitly acknowledge that their

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80/ APC Comments at 9-11.

81/ Id. at 11.

82/ U S West Comments at 43-46; PacBell Comments at 67-69.

overblown cost recovery fears are not their only concern in determining the appropriate rate that a carrier should be permitted to charge for use of its facilities.

The LECs also attack the analogy made by Dr. Brock to compensation arrangements on the Internet.[83] The LEC characterizations of Internet arrangements merely confirm Dr. Brock's conclusions and demonstrate that LECs are not in favor of extending a system that works well in a competitive market into markets that they overwhelmingly dominate. As demonstrated in Dr. Brock's response, none of these parties challenge the basic factual point that a large number of unregulated competitive network providers voluntarily exchange traffic on a bill and keep.[84] Furthermore, while some LECs make much of the fact that many Internet providers are not part of the bill and keep arrangement, the entities that are the functional equivalent of co-carriers are part of the arrangement and those that are the functional equivalent of customers are not.[85]

83/ U S West Comments at 30; BellSouth Comments at 25; NYNEX Comments at 30.

84/ Brock Reply at 11. This mutual exchange of traffic has not only survived, but it has shown great resiliency during a period of tremendous growth and change for the Internet. While bill and keep may not provide these network providers an exact recovery of costs, it is apparent they believe the amount of unrecovered costs is less than the transactions costs of developing complex pricing plans and settlement arrangements.

85/ Id. at 11. This distinction is consistent with the TCA, which entitles carriers to greater rights than customers with regard to incumbent LEC functions that must be made available and their pricing.

3. Pricing Proposals (Interim, Long Term, Symmetrical).

No sustainable arguments have been presented against bill and keep as a pro-competitive interim LEC-to-CMRS interconnection compensation method. Rather than argue the merits of this issue, the LECs have attempted to steep the record in their version of good public policy -- making sure they protect their existing monopoly rents. Indeed, in their desperate attempt to throw the kitchen sink at the Commission's pro-competitive bill and keep initiative, the LECs have actually filed comments in which their own economic experts undermine their credibility by inconsistent statements.

PacBell, for example, relies on the economic analysis of its expert, Jerry A. Hausman, to argue that LECs should be entitled to recover more than their incremental costs for CMRS interconnection. PacBell in its comments and Hausman in his supporting attachment state that both fixed and common costs should be included when determining the socially appropriate cost of CMRS interconnection.[86/] However, SBC also includes with its comments testimony that Hausman filed in 1995 with the Commonwealth of Massachusetts Department of Public Utilities. In contrast with PacBell's Hausman attachment, this previous Hausman testimony states that LEC-to-CMRS network interconnection rates should be set at long-run incremental (marginal) costs, agreeing in general with the position of Cox's

86/ PacBell Comments at 56; PacBell Comments Exhibit B, Statement of Jerry A. Hausman at 22.

economist, Dr. Brock.[87] Marginal cost-based interconnection rates promote economic efficiency, according to this Hausman statement, because if interconnection rates are priced above marginal cost the users of interconnection may shift to lower priced but higher cost alternatives, thus wasting society's resources. In his Massachusetts testimony, Hausman explicitly opposes adding "some amount of contribution above incremental costs" to interconnection rates, and goes on to state that "no economic basis exists" to assign fixed and common costs to interconnection. Hausman thus urges the Massachusetts DPU to design interconnection charges to reflect only marginal economic costs, presumably because the cost of this input is significant to Cellular One, the cellular operator on whose behalf Hausman appeared.[88]

Evidently Hausman has had a change of heart, because he now claims for PacBell that "numerous regulatory distortions" exist such that long-run incremental cost is no longer the "economically efficient" method of pricing interconnection.[89] Such a significant switch in what constitutes economic efficiency in CMRS interconnection in less than a year is curious, given Hausman's long experience in the telecommunications industry. Hausman's apparent

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87/ SBC Comments Attachment A, Testimony of Jerry A. Hausman on Behalf of Cellular One, Commonwealth of Massachusetts Department of Public Utilities, D.P.U. 94-185, May 1995 at 5.

88/ Id. at 7. This is, of course, entirely consistent with Dr. Brock's view of appropriate long-term interconnection pricing signals. Brock Reply at 9.

89/ PacBell Comments Exhibit B, Statement of Jerry A. Hausman at 22.

latest view, however, reveals the LECs' strong desire to avoid dealing with potential competitors as peer networks.[90/]

As this example shows, the Commission must be wary of the LEC rhetoric against interim bill and keep. When that rhetoric is pushed aside, the comments show that none of the LECs has submitted hard evidence that the average incremental cost of call termination, expressed on a per minute basis, is anything other than 0.20 cents per minute.[91/] Instead, the LECs discuss phantom "evidence" to support claims, such as USTA's, that interconnection costs -- that add back overhead -- are as high as 1.3 cents per minute.[92/] Other LEC figures, such as PacBell's 0.6 cents per minute, also are totally unsupported, as are PacBell's statements that the costs of creating traffic metering capability are low.[93/] Further, most

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90/ As previously stated, LEC attempts to add back fixed and common costs, overheads and universal service obligations on top of the statutorily mandated incremental cost standard are entirely at odds with the exercise the FCC and states must shortly engage in to implement the TCA. Accordingly, their experts that argue the need to recover subsidies from interconnectors have failed to make a credible case.

91/ See Cox Comments at 13. Many of the LECs commented about how they disagree with this figure as too low, but none of them provide evidence that the calculation is wrong.

92/ USTA Comments Attachment at 10. USTA's figure is misleadingly labeled an incremental cost figure, but it in fact includes overhead costs. See USTA Comments, SPR Report at 9 ("These analyses measure as incremental costs some of what engineering studies often classify as overhead.").

93/ PacBell Comments Exhibit B, Statement of Professory Jerry A. Hausman at 14. PacBell's comments also show that PacBell's 0.6 figure includes more than incremental costs. PacBell Comments Exhibit D, Incremental Cost Principles for Local and Wireless Network Interconnection at 4 ("In particular, interstate access and interconnection rates must

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